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Twenty-ninth session

SUMMARY RECORD OF THE 584th MEETING

Held at Headquarters, New York,
on Tuesday, 28 May 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued)

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The meeting was called to order at 3.20 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued) (A/CN.9/418)

Paragraphs 6 and 7

1. Mr. HOLTZMANN (United States of America) said that the Commission needed to decide between variant 1 (para. 6) and variant 2 (para. 7). His delegation felt that variant 2 was preferable because in most cases the Notes would be used in two-party arbitration and there would be no need to spend time reading about the difference between two-party arbitration and multi-party arbitration. Variant 2 clearly directed the minority involved in multi-party cases to the section of the Notes that dealt with its special concerns and made it clear to the majority that it need not consider the somewhat complex concepts of variant 1.

2. Mr. HUNTER (United Kingdom), supported by Mr. TELL (France) and Mr. FERRARI (Italy), said that variant 2 was preferable; variant 1 was too detailed to be included in the introductory section.

3. Mr. GRIFFITH (Australia) and Mr. ABASCAL (Mexico) said that they also favoured variant 2.

4. Paragraph 6 was deleted.

5. Paragraph 7 was adopted.

Paragraphs 8 to 10

6. Mr. HOLTZMANN (United States of America) suggested that in paragraph 9, the words "or other electronic means" should be added after the words "telefax or conference telephone calls" so as to conform with paragraphs 37 and 38 and to recognize that in the modern world there were other electronic means than those mentioned in the paragraph.

7. Mr. HUNTER (United Kingdom) said that he supported that proposal.

8. Mr. CHOUKRI (Observer for Morocco) said that the Arabic version of paragraph 9 referred to a single meeting, rather than "one or more meetings", and must be brought in line with the other language versions.

9. Paragraphs 8 to 10, as amended, were adopted.

Paragraphs 11 to 14

10. Mr. HOLTZMANN (United States of America) said that in paragraph 14, it would be useful to add the words "by other provisions agreed to by the parties" after the words "arbitration rules", since the parties might have side agreements, or provisions in their contracts, relating to the conduct of the arbitration, which would limit the discretion of the arbitral tribunal.

11. Mr. GRIFFITH (Australia) and Mr. FERRARI (Italy) said that they supported that proposal.

12. Paragraphs 11 to 14, as amended, were adopted.

Paragraphs 15 to 17

13. Mr. CHOUKRI (Observer for Morocco) said his delegation felt that the reference in paragraph 15 to securing the agreement of the arbitral institution should be deleted since it was up to the parties to choose the arbitration rules, and they would not necessarily be the rules of the arbitral institution.

14. Mr. SEKOLEC (International Trade Law Branch) said that that point had been considered at some length at the previous session. The reference was to the agreement of the arbitral institution concerning the performance of the functions of that institution, and not to the permission of the institution to use its rules. The wording was recorded in paragraph 332 of the Commission's report on the work of its twenty-eighth session (A/50/17).

15. Mr. HUNTER (United Kingdom) said that the problem could be solved by changing the word "would" to "may"; that would cover other eventualities as well as the point made by the observer for Morocco.

16. Mr. TELL (France) said that. as in the case of paragraph 4, paragraph 17 needed to be amended to reflect the fact that in some legal systems, there was no requirement that international arbitration should be subject to national law.

17. Mr. SEKOLEC (International Trade Law Branch) suggested the wording "... on the basis of provisions of law that may govern the arbitral procedure ...". That would cover all cases, including cases where there was no national law governing the arbitral procedure, while not confusing the issue in cases where such a law did exist.

18. Mr. TELL (France) and Mr. HUNTER (United Kingdom) said that they could accept that wording.

19. Paragraphs 15 to 17, as amended, were adopted.

Paragraphs 18 to 21

20. Mr. FERRARI (Italy), referring to paragraph 19, said that the examples of documents which might not need to be translated or might have to be translated only in part should be deleted so as not to discourage arbitrators from having translations made. The sentence would then read "In the interest of economy, some documents might not need to be translated, or may have to be translated only in part."

21. Mr. HOLTZMANN (United States of America) said that paragraph 20 should make a distinction between simultaneous and consecutive interpretation, since the choice of method had implications in terms of cost and time: consecutive interpretation was cheaper, but it doubled the length of a hearing. The

question needed to be considered at an early stage because it had an impact on scheduling and on deposits for costs.

22. Mr. ABASCAL (Mexico), referring to paragraph 19, said that conflicts might arise in cases where one of the parties submitted documents in a language other than the language of the proceedings. In such cases, the arbitrators might request the party concerned to provide a translation; the other party might not be satisfied with the translation, and might wish to submit an alternative version. He therefore suggested that the paragraph should include a sentence to the effect that the parties should consider the possibility of conflicts between translations provided by the parties or between translation methods proposed by them. The final wording could be left to the secretariat.

23. With regard to paragraph 20 his delegation supported the United States proposal.

24. Mr. TELL (France), referring to paragraph 19, suggested that in the French version, the word "législation" in the third sentence should be replaced by "règles de droit".

25. Mr. FARIDI ARAGHI (Islamic Republic of Iran), referring to paragraph 19, said that his delegation supported the Italian proposal. As to the concern expressed by the representative of Mexico, conflicts might be avoided if the text referred to "official translations", as that term implied that the translations would be made by licensed individuals.

26. Mr. GRIFFITH (Australia) said that his delegation had no objection to amending the last sentence of paragraph 19 to read "Some documents may not need to be translated or may have to be translated only in part."

27. Mr. CHOUKRI (Observer for Morocco) said that his delegation did not support deletion of the examples in paragraph 19; it did, however, favour deletion of the words "or commentaries in the final brackets", as "commentaries" was a very broad term.

28. Mr. FERRARI (Italy) said that the comments by the representative of Mexico related not only to conflicts involving translation and interpretation, but to broader issues, such as that of expert opinions presented by the parties.

29. The CHAIRMAN suggested that the Commission should revert to the Mexican proposal at a later time. She took it that the Commission wished to delete the bracketed portions of paragraph 19, as proposed by the representative of Italy.

30. It was so decided.

31. Paragraphs 18, 20 and 21 were adopted.

Paragraphs 22 to 24

32. Mr. GRIFFITH (Australia), referring to paragraph 23, suggested that the term "support services" should be changed to "administrative services".

33. Mr. HOLTZMANN (United States of America) said that his delegation could not accept the Australian proposal, as administrative services in the context of arbitration typically referred to the services provided by an arbitral institution, while support services included the availability of local counsel, secretarial services and a variety of other services that did not fall within the purview of an arbitral institution.

34. Mr. GRIFFITH (Australia) withdrew his delegation's proposal.

Paragraphs 22 to 24 were adopted.

Paragraphs 25 to 28

35. Mr. ABASCAL (Mexico) said that the second sentence of paragraph 25, which began with the phrase "When the parties have submitted the case to an arbitral institution, ...", should be amended, as parties did not submit a case to an arbitral institution, but to arbitral proceedings supervised by an institution.

36. Mr. HOLTZMANN (United States of America) said that his delegation welcomed the comments by the representative of Mexico. The sentence could perhaps be amended to read "When an arbitral institution is involved in a case ...".

37. Mr. CHOUKRI (Observer for Morocco) suggested that, in view of the financial implications of engaging a secretary, paragraph 26 might stipulate that the parties should engage a secretary to provide administrative services for the tribunal.

38. Mr. HUNTER (United Kingdom), said that the wording of the last two sentences of paragraph 28 provided too much encouragement to those who felt that the functions of an arbitrator could be delegated to the secretary of the tribunal. The general view in the international community was that an arbitral tribunal could not delegate its essential decision-making function. He therefore suggested that the following sentence should be added at the end of the paragraph: "However, it is typically recognized that it is important to ensure that the secretary does not usurp the decision-making functions of the arbitral tribunal."

39. Mr. HOLTZMANN (United States of America) supported by Mr. ABASCAL (Mexico), welcomed the United Kingdom proposal.

40. Mr. SANDOVAL LÓPEZ (Chile) said that his delegation did not see the need for the proposed amendment as the secretary's functions would be carried out under the supervision of the arbitral tribunal, and the secretary would thus be unable to usurp the tribunal's functions.

41. Mr. GRIFFITH (Australia) proposed deleting the last two sentences of paragraph 28 and inserting a short sentence emphasizing that the secretary should never usurp the decision-making functions of the arbitral tribunal.

42. Mr. TELL (France) endorsed the proposal of the United Kingdom.

43. Mr. HERRMANN (Secretary of the Commission) said that since the secretary carried out tasks under the direction of the arbitral tribunal, as indicated in paragraph 27, paragraph 28 should specify that, while some tasks might be delegated to the secretary, they should never include any decision-making functions. He suggested that a more neutral term should be used to replace the verb "usurp", such as "perform" or "carry out".

44. The CHAIRMAN said that if she heard no further comments she would take it that the Commission agreed to let the secretariat provide appropriate wording for paragraph 28.

45. It was so decided.

46. Paragraphs 25 to 28, as amended, were adopted.

Paragraphs 29 to 31

47. Mr. LEBEDEV, referring to paragraph 30, which dealt with the management of deposits, proposed that the words "taking into account the nature of such deposits" should be inserted at the end of the second sentence to cover situations such as deposits which were exempt from taxation.

48. The CHAIRMAN said that if she heard no further comments she would take it that the Commission wished to adopt paragraphs 29 to 31 as originally drafted.

49. Paragraphs 29 to 31 were adopted.

Paragraphs 32 and 33

50. Mr. CHOUKRI (Observer for Morocco), referring to paragraph 33, which dealt with confidentiality, proposed that the references to the identity of arbitrators and to the content of the award should be deleted. The identity of arbitrators was generally public information and the content of awards was an aspect of jurisdiction; accordingly, the parties should not be encouraged to keep such matters confidential.

51. Mr. GRIFFITH (Australia) said that the first sentence in paragraph 32 could be incorrectly construed to mean that confidentiality was an essential aspect of arbitration which, in fact, it was not in all jurisdictions. The draft Notes should state in broader terms that the issue of confidentiality could be dealt with expressly by the parties or covered in the applicable arbitral rules, but that in the absence of a specific arbitral rule, parties should not assume that the obligation of confidentiality was implied. Parties should consider the issue before the arbitration began and make specific provisions for confidentiality if they so desired.

52. Mr. HUNTER (United Kingdom) agreed that the draft Notes should encourage parties to consider the need for an agreement on confidentiality.

53. Mr. HOLTZMANN (United States of America) agreed that the parties should be advised that confidentiality was not necessarily assured and that they had to make specific agreements. He proposed that a small drafting group should review

the issue of confidentiality and that discussion of the matter should be deferred.

54. Mr. HERRMANN (Secretary of the Commission) said it would be helpful if the Commission provided further guidance on the matter of confidentiality, which continued to be an important topic of discussion in arbitration circles. For the purposes at hand, however, it would be sufficient to indicate that in the absence of express rules for confidentiality, parties should not assume the existence of an implied confidentiality recognized by courts in all jurisdictions. If parties wished to include an agreement on confidentiality, they could proceed in accordance with the guidelines in paragraph 33.

55. The CHAIRMAN said that the secretariat would provide a final draft of paragraph 33.

56. Paragraphs 32 and 33 were adopted.

Paragraphs 34 and 35

57. Paragraphs 34 and 35 were adopted.

Paragraphs 36 to 38

58. Mr. FERRARI (Italy) said that his delegation objected to the negative implications in paragraph 36 regarding the use of telefax. He suggested that the paragraph should be deleted or redrafted.

59. Mr. HOLTZMANN (United States of America), agreeing with the representative of Italy, proposed to delete the word "while" in the first sentence of paragraph 36 so that it would read "The use of telefax in arbitration proceedings offers many advantages over traditional means of communication." The next sentence might then begin with the words "It is, nevertheless, advisable ..." and continue as drafted. He further proposed that the phrase "in light of those considerations" should be deleted from the next sentence so that it began "It might be decided that ..." and continue with no further changes. In that way, the paragraph would endorse the use of telefax but would also mention the necessary precautions to be taken with regard to equipment.

60. Mr. ABASCAL (Mexico) supported the United States proposal and suggested that the reference in the first sentence to "the advisability of considering whether the equipment used offered satisfactory security" should be deleted in order to avoid any confusion.

61. Mr. GRIFFITH (Australia) said that the paragraph should be as short as possible to avoid confusion and ensure that it encouraged rather than discouraged the use of telefax. He proposed that the secretariat should provide the precise wording of paragraph 36.

62. Mr. TELL (France) supported the proposal of Italy and the deletion of the second part of the first sentence as well as the second sentence.

63. Referring to paragraph 38, he said that the phrase "to avoid technical difficulties" was misleading, since no suggestions for avoiding such difficulties were provided in the paragraph.

64. Mr. ABASCAL (Mexico) said that, if paragraph 36 was retained, his delegation would prefer the wording proposed by the delegation of the United States of America for the first sentence; it reflected a more positive attitude to the use of telefax.

65. Mr. HUNTER (United Kingdom) said that since the use of telefax gave rise to specific problems, paragraph 36 should not be deleted. His delegation favoured the wording proposed by the representative of the United States of America. He agreed with the representative of Mexico that the second sentence should be deleted, and suggested that the third sentence could be left to the secretariat to redraft as appropriate.

66. Mr. FERRARI (Italy) agreed that the first sentence of paragraph 36 should be reworded in a more positive way.

67. Mr. TELL (France) supported the remarks by the representatives of Mexico and Italy and added that if the second sentence was retained, it would be inappropriate to warn against the use of telefax for certain types of documents.

68. The CHAIRMAN said that paragraph 36 would be redrafted accordingly, and that the revised English text would be made available at the following meeting.

69. Paragraphs 36 to 38, as amended, were adopted.

Paragraphs 39 to 42

70. Paragraphs 39 to 42 were adopted.

Paragraph 43

71. Mr. HOLTZMANN (United States of America) proposed that the following subparagraph should be added at the end of the paragraph: " - the method by which submissions will be made, e.g. whether on paper or by electronic means, or both (see also paras. 36 to 38)".

72. Mr. GRIFFITH (Australia) suggested that it was already implicit in the guidelines that submissions could be made by electronic means. Moreover, the wording of the new subparagraph did not sit well with the rest of the paragraph.

73. Mr. FERRARI (Italy) supported the proposal of the United States of America.

74. Mr. HOLTZMANN (United States of America) said that the increasing availability and use of electronic means should be recognized in the text. Any necessary redrafting of the paragraph should be left to the secretariat.

75. The CHAIRMAN said that the paragraph would be redrafted accordingly.

76. Paragraph 43, as amended, was adopted.

The meeting rose at 6 p.m.